August, 1994

HONOR ROLL

417th Session, Basic Law Enforcement Academy - April 5 though June 30, 1994

Best Overall:	*Deputy Jack W. Clampitt - Kitsap County Sheriff's Department*
Best Academic:	*Deputy Jack W. Clampitt - Kitsap County Sheriff's Department*
Best Firearms:	*Deputy Joseph T. Rhymes Jr. - Okanogan County Sheriff's Department*
President:	*Deputy Chad Richardson - Pierce County Sheriff's Department*

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Corrections Officer Academy - Class 197 - June 6 through July 1, 1994

Highest Overall:	*Officer David B. Ganas - Airway Heights Correctional Center*
Highest Academic:	*Officer Jeffrey A. Hughes - Chelan County Regional Jail*
Highest Practical Test:	*Officer David B. Ganas - Airway Heights Correctional Center*
Highest in Mock Scenes:	*Officer David B. Ganas - Airway Heights Correctional Center* *Officer Jeffrey A. Hughes - Chelan County Regional Jail*
Highest Defensive Tactics:	*Officer Jeffrey A. Hughes - Chelan County Regional Jail*

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WASHINGTON STATE COURT OF APPEALS

CrRLJ 3.1 MAY REQUIRE THAT ARRESTING OFFICER GIVE IMMEDIATE WARNING OF RIGHT TO COUNSEL FOLLOWING ARREST EVEN IF NO INTERROGATION TO FOLLOW

State v. Trevino, 74 Wn. App. ___ (Div. III, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On January 1, 1992, just after midnight, [a Spokane County sheriff's deputy] observed a vehicle weaving on East Sprague in Spokane. [The deputy] stopped the vehicle and asked its driver, Oscar C. Trevino, to perform standard field tests for DWI investigation. Concluding that Mr. Trevino had failed the field tests, [the deputy] arrested him and drove him to the Public Safety Building to perform a BAC Verifier DataMaster breath test.
>
> At 1:02 a.m. the deputy asked to check and then checked Mr. Trevino's mouth to begin the 15-minute observation period required by WAC 448-13-040 for a breath test. At 1:05 a.m. the deputy read Mr. Trevino his Miranda warnings and at 1:09 a.m. he gave Mr. Trevino his implied consent warnings. Mr. Trevino stated he understood both warnings and signed an affidavit to that effect. After consulting with an attorney, he submitted to two breath tests. Mr. Trevino was issued a citation for driving while under the influence of alcohol.
>
> Mr. Trevino moved to suppress evidence of (1) the deputy's inquiry whether he had anything foreign in his mouth; (2) Mr. Trevino's response to the question; and (3) the deputy's observation of Mr. Trevino's mouth. At the hearing on the motion conducted April 29, 1992, the District Court suppressed the evidence because it was obtained before Mr. Trevino had been notified of his right to counsel. Although the court did not suppress results of the breath test, the State was effectively prevented from entering those results because it could not establish there had been nothing in Mr. Trevino's mouth during the 15 minutes prior to the test.
>
> On review of the District Court's ruling, the Superior Court affirmed . . .. The court also held that a DWI suspect does not need to establish prejudice in order to suppress evidence obtained in violation of CrRLJ 3.1(c)(1).

[Footnotes, name omitted]

ISSUES AND RULINGS: (1) Did Trevino's right to counsel under CrRLJ 3.1 attach before the officer asked to look in his mouth? (ANSWER: Yes); (2) Must actual prejudice to the rights of the defendant be shown in order for evidence to be suppressed for a violation of CrRLJ 3.1(b)(1),

(c)(1)? (ANSWER: No) Result: Spokane County District Court and Superior Court orders suppressing evidence affirmed by a 2-1 majority. Status: Petition for review pending in the State Supreme Court.

ANALYSIS BY MAJORITY :

(1) ATTACHMENT OF RIGHT TO COUNSEL

The Court of Appeals analysis on the counsel right attachment issue under the court rule is as follows:

> CrRLJ 3.1(b)(1) provides "[t]he right to a lawyer shall accrue as soon as feasible after the defendant has been arrested . . .". After arrest, the suspect must be advised "as soon as practicable" of the right to a lawyer. CrRLJ 3.1(c)(1). The Task Force Comment to Rule 3.1 states that "as soon as practicable" should be interpreted as "immediately" if no problems of interpretation -- such as with a deaf person or non-English-speaking person -- exist. . . .
>
> The State contends the right to an attorney afforded by CrRLJ 3.1 did not attach before the deputy asked Mr. Trevino if he had anything foreign in his mouth or looked into Mr. Trevino's mouth to check. It argues these actions constitute nontestimonial conduct similar to sobriety field tests, and as such, are exempted from Miranda protections. It relies on Heinemann v. Whitman Cy., 105 Wn.2d 796 (1986) for the proposition that Miranda warnings including the right to a lawyer, are not required before sobriety field tests and other nontestimonial situations.
>
> In Heinemann, however, the suspect was not in custody at the time of the field tests and therefore did not yet have the right to counsel required by former JCrR 2.11. Noting that JCrR 2.11(c) goes beyond the requirements of the sixth amendment of the United States Constitution, the Heinemann court ruled that the defendant must be advised of his right to counsel immediately after he is taken into custody. In Mr. Trevino's case, as soon as practicable means "immediately" after his arrest in the field.
>
> The State urges interpretation of the phrase "as soon as practicable" to mean in the most efficient time. It argues the reliability of the results of the breath test is best insured by beginning the 15-minute observation period before the possible delay resulting from a suspect conferring with a lawyer. Alternatively, it contends the mouth check at the beginning of the 15-minute observation period is not part of the actual breath test. It asserts the events leading up to the air samples, including the observation period, are not part of the test because they constitute nontestimonial conduct. We disagree on both counts.
>
> Following an arrest, the State must inform a defendant of the right to counsel before administering the breath test. The test must be performed "according to methods approved by the state toxicologist . . .". RCW 46.61.506(3). Those methods, set out in WAC 448-13-040, include the requirement that the suspect's mouth be checked for foreign objects before a mandatory 15-minute observation period. The mouth check and observation period are therefore integral steps in the BAC Verifier DataMaster test procedure.

> Here, refusal to open his mouth would have indicated Mr. Trevino's refusal to take the breath test because the test procedure could not have started until his mouth was checked. Accordingly, if he had refused to open his mouth, Mr. Trevino could have lost his driver's license for a year and the refusal would have been admissible in criminal proceedings. Mr. Trevino had a right to be advised of his right to a lawyer before the State began administration of the BAC Verifier DataMaster test procedure.

[Footnotes, some citations omitted]

(2) PREJUDICE

The Court holds that showing of actual prejudice need not be shown in order for the courts to suppress evidence. Any violation of CrRLJ 3.1(b)(1), (c)(1), requires suppression of evidence discovered as a result of the violation, the Court holds.

DISSENTING OPINION:

Judge Munson dissents from the majority opinion, asserting the following:

> It is inconceivable that, 27 years after the United States Supreme Court's decision in Miranda v. Arizona . . ., law enforcement officers play games with advising arrestees of their Miranda rights. But, assuming there is a court [rule] error here, I believe the error, if any, was harmless. Nothing was found in Mr. Trevino's mouth; he talked to an attorney; he took the BAC test. The result reached here is overly technical. I would reverse.

LED EDITOR'S COMMENT: We would guess that dissenter Munson has been watching too many Cagney and Lacey reruns; he seems to think that arrestees must be Mirandized in every case as soon as they are placed under arrest. Miranda requires no such thing. Indeed, Miranda requires warnings to an arrestee only if interrogation is to follow.

On the other hand, however, the little-known court rule, CrRLJ 3.1(b)(1), (c)(1), addressed in Trevino does, per Trevino, appear to require an immediate post-arrest warning about the right to counsel. Trevino is being appealed further and we hope it will be reversed. Meanwhile, however, officers would be well-advised to give a warning along the following lines in every arrest, immediately after arrest, and prior to transport --

> **You have the right to counsel. If you are unable to pay for counsel, you are entitled to have one provided without charge.**

This warning is printed as a separate warning on Criminal Justice Training Commission Miranda cards. Officers giving this separate warning following arrest would not need to obtain a response from the arrestee, nor would they need to give full Miranda warnings unless they planned to interrogate the arrestee at that point. If actual interrogation is intended however, then full Miranda warnings and waiver would be required.

OFFICER'S KNOWLEDGE CURES WRONG APARTMENT NUMBER ON SEARCH WARRANT

State v. Bohan, 72 Wn. App. 335 (Div. I, 1993)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On January 9, 1992, Detective Vargas of the Snohomish County Sheriff's Department was approached by a confidential informant (CI), who told Vargas that he could buy controlled substances from a person selling them out of an apartment located in the Fireside Apartments complex in Everett.
>
> Later that same day Vargas accompanied the CI to the Fireside Apartments. Vargas sent the CI in to attempt a controlled buy with money from the Department's narcotics buy fund. Vargas watched the CI enter and later exit a particular apartment. The CI returned with a controlled substance. The substance field-tested positive for the presence of cocaine. The CI told Vargas he had purchased the cocaine from "Ken" in apartment D-8. [COURT'S FOOTNOTE: The Fireside Apartments consist of five identical 2-story buildings, all painted the same light color. The only distinguishing characteristic among the buildings, other than their respective locations within the compound, was the large letter affixed to each building, labeling them A to E.]
>
> Vargas returned to the office and wrote an affidavit for a search warrant. Vargas then telephonically applied for the warrant to search apartment D-8 of the Fireside Apartments. The only physical description Vargas included in the warrant was that the apartment was located in a light-colored 2-story building. The judge granted the warrant to search apartment D-8 at the Fireside Apartments.
>
> Vargas returned later that same day to the Fireside Apartments to execute the warrant. Vargas approached the same apartment door he had observed the CI enter and exit from during the controlled buy. It was not until then that Vargas realized that the address of the apartment he intended to search was A-8, not D-8 as listed on the warrant. Vargas nevertheless decided to execute the warrant. The search resulted in the seizure of controlled substances and the arrest of the occupant, Kenneth Bohan, for violation of RCW 69.50.401(d).
>
> Prior to trial, Bohan moved to suppress the evidence seized during the search of his apartment, arguing that the warrant did not satisfy the particularity clause of the Fourth Amendment.

ISSUE AND RULING: Under the totality of the circumstances -- including the fact that one of the executing officers personally knew the correct address -- did the wrong apartment number on the warrant create a reasonable probability of a search in the wrong location? (ANSWER: No)
Result: Snohomish County Superior Court order suppressing narcotics evidence seized under the warrant and dismissing the charges reversed; charges reinstated and case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might be mistakenly

searched. . . .

Cases applying this standard to warrants containing a wrong address decline to give primary emphasis to the technical accuracy of the address. The key is that there must be assurances that a mistaken search would not be likely to occur.

The trial court held that the search was unlawful because Vargas would have searched the wrong apartment if he had gone to D-8, as listed on the search warrant. Certainly it is true that if Vargas had gone to D-8 as stated in the warrant, a mistaken search would have occurred. In fact, if any other officer but Vargas had executed the warrant a mistaken search could scarcely have been avoided. Only Vargas knew which apartment the CI had entered at the time of the controlled buy.

But the test as applied does not ask whether it is hypothetically or theoretically possible, under other circumstances than those present, that the wrong premises could be searched. Rather, the test is one of practical application: given the *actual* facts of a given case, can the officer who actually executes the warrant by reasonable effort find and determine the correct premises to be searched, without having to resort to guesswork? If so, the warrant is not constitutionally defective.

Information concerning the location of the premises based on the officer's personal knowledge of the location or its occupants may be considered when a correct address is missing. Where it was established that the officers already knew where the defendant lived, an error in the address listed on the warrant was immaterial.

In this case, the record shows that the designation of the apartment as D-8 was the result of a misstatement by the CI, not the result of an erroneous observation by Vargas. When Vargas returned to the Fireside Apartments to execute the warrant, he went directly to the same apartment he had seen the CI enter. There is no evidence that Vargas was ever confused a to which apartment was the one where the controlled buy occurred. There has been no challenge to the officer's credibility. Further, as soon as Vargas reached the apartment he realized the mistake on the warrant. We hold that under the facts of this case, Vargas' knowledge was sufficient to cure the defect in the warrant's description of the premises to be searched.

. . . In this case, while Bohan was able to establish the theoretical possibility and even a high theoretical probability that the wrong premises would be searched *if Vargas were not the executing officer*, it is not enough, because Vargas *was* the executing officer and he knew full well in which apartment the controlled buy had occurred only a few hours earlier.

. . .

Here, the evidence giving rise to probable cause to search Bohan's apartment was submitted for independent evaluation by a magistrate and that there was probable cause to issue the warrant has not been challenged. The mistake in the address was somewhat akin to a typographical error. It did not require Officer Vargas to guess as to the identify and location of the apartment had had the authority to

search. There was no reasonable probability that Officer Vargas would perform a mistaken search not supported by probable cause. Thus the protection guaranteed by the Fourth Amendment was not compromised by the error in the address. For these reasons, we reverse and remand for reinstatement of the charges.

[Citations and footnotes omitted]

KNOCK-AND-ANNOUNCE RULE DOESN'T REQUIRE CONSENT TO POLICE ENTRY IF THEY SHOW SEARCH WARRANT TO OCCUPANT AFTER KNOCKING AND ANNOUNCING

State v. Allredge, 73 Wn. App. 171 (Div. II, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

At about 6 p.m. on October 4, 1990, approximately eight police officers went to Alldredge's home to execute a search warrant. The validity of the warrant is not questioned by either party. The basis for its issuance was probable cause to believe Alldredge was growing marijuana.

The police had no specific information that Allredge was armed or dangerous. In the past, however, they had often found firearms while executing search warrants on homes in which marijuana was being grown.

Six officers went to the front door. [COURT'S FOOTNOTE: Two officers went to the back of the house.] The lead officer and another officer took positions on each side of the door. The remaining officers stood behind the first two, and all six had their guns drawn.

The lead officer knocked but received no response. After 5 or 10 seconds, he knocked again, this time announcing "Police with a search warrant". He heard footfalls coming toward the door, and the door opened, revealing Alldredge. At this point, Alldredge and the lead officer were face to face, with the lead officer pointing his gun at Alldredge's chest. The lead officer again announced, "Police with a search warrant". Simultaneously, he pushed Alldredge back into the living room. He was followed by the remaining officers, who then"swe[pt] the residence for additional persons."

Alldredge had just finished taking a shower when he heard the knock at his front door. He went to the door, opened it, and was pushed back into the living room as described above. He did not perceive an announcement of identity or purpose before or after he opened the door. He concedes, however, that he was very frightened after he opened the door, and that he might have failed to perceive an announcement made at that time.

At no time was Alldredge given an opportunity to grant or deny permission for the police to enter his house. The lead officer did not ask, "May we come in?", nor did Alldredge have a chance to respond, even impliedly, to that sort of inquiry. According to the lead officer, "As soon as the door was open enough to where I could see somebody, . . . I announced again and went in." According to the trial

court's findings, "Alldredge had no time to react before he was pushed back into the residence."

The police found about 50 marijuana plants growing in the house. About a week later, Alldredge was charged with unlawfully manufacturing marijuana.

Before trial, Alldredge filed a motion to suppress. He did not allege that the search warrant had been improperly issued; rather, he alleged it had been improperly executed. More specifically, he argued that the police had violated the knock-and-wait rule by not asking permission to enter the house, and by not giving him an opportunity to grant or deny such permission. The trial court denied the motion and convicted on stipulated facts.

[Some footnotes omitted]

ISSUE AND RULING: Does the knock-and-announce rule of RCW 10.31.040 require that police, who have knocked and announced their presence and purpose, and who possess a search warrant, give an occupant who answers the door an opportunity to deny entry? (ANSWER: No) Result: Clark County Superior Court conviction for unlawfully manufacturing a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The knock-and-wait rule basically has two parts. One requires that the police knock and announce their identity and purpose. The other requires a waiting period, the duration of which is often linked to whether the police are refused admittance. "[B]oth the cases and the literature have concentrated solely upon the 'announcement' portion . . .; little attention has been devoted to the issue of when 'refusal of admittance' is necessary."

The announcement portion of the rule is not in issue in this case. Alldredge does not dispute that the police knocked and announced their identity and purpose, both before and after he opened the door.

The waiting period is in issue. Alldredge argues that the waiting period could not end until the police requested, and he granted or refused, permission to enter. Essentially, he contends that when police executing a valid search warrant confront an occupant at the door, they must ask, "May we come in?", and then wait for an express or implied response. The State responds by asserting that the waiting period ended when Alldredge opened the door and the police identified themselves and their purpose face to face.

We begin by analyzing the waiting period constitutionally. The knock-and-wait rule is part of the constitutional requirement that search warrants be reasonably executed. Reasonableness does not require that police wait, if to do so would serve no purpose. Thus, from a constitutional perspective the rule's waiting period ends not later than when the rule's purposes have been fulfilled.

The rule serves three purposes. One is to forestall violence. If the police enter a residence before its occupants perceive their identity and purpose, the occupants

will be surprised; they may believe themselves under attack; and they may respond with force. If the police enter after the occupants have perceived their identity and purpose, it is more likely than otherwise that the occupants will peacefully submit to their authority.

A second purpose is to protect privacy, but in a limited way. . . . the rule gives an occupant of the premises a few moments to answer the door, and during that time he or she can curtail highly personal activities, such as those that might be occurring in the bathroom or bedroom.

A third purpose is to avoid unnecessary property damage. If the police enter without giving the occupant time to open the door, they will have to break it in, assuming it is locked. If they wait and the occupant opens it, property damage will be averted.

For the most part, each of these purposes is fulfilled not later than when the door of the premises is open, attended by an occupant, and the police have announced to the occupant their identity and purpose. . . . Highly personal activities are likely to have been terminated in the interval between the knock and the opening of the door, and entry can be made through the open door without damage to property. Thus, from a constitutional perspective, the rule's waiting period should end not later than when the door of the premises is open, attended by an occupant, and the police have announced their identity and purpose while face to face with the occupant.

We next analyze the waiting period statutorily. RCW 10.31.040 provides:

> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

This language applies to search warrants as well as arrests.

RCW 10.31.040 codifies the knock-and-wait rule, at least in part. It presupposes both an announcement and a waiting period. With regard to the waiting period, it clearly provides that an officer seeking entry need not wait *after* "he [or she] be refused admittance". The question here, however, is whether an officer must wait *until* "he [or she] be refused admittance". Alldredge says yes; the State says no.

The State is correct. RCW 10.31.040 must be read in light of its purposes. Its purposes are the same as those of the rule, because it embodies the rule. Thus, when the statute is read in light of its purposes, it provides that the waiting period ends *as soon as* the police are refused admittance, but *not later than* when the purposes of the rule are fulfilled. In other words, in *permitting* the police to enter after they have been refused admittance, it does not *preclude* them from entering sooner, provided that the purposes of the knock-and-wait rule have been fulfilled.

Neither our constitutional nor statutory analysis involves consent, as opposed to notice. The rule's waiting period is not intended to require that police with a valid

search warrant seek or obtain consent to enter the premises. When police have a valid search warrant, a neutral magistrate has already determined that they have the right to enter. Thus, they may enter with or without consent from an occupant.

[**LED EDITOR'S NOTE: The Court of Appeals here discusses several cases, including State v. Shelly, 58 Wn. App. 908 (Div. II, 1990) Dec. '90 LED:13, and State v. Lehman, 40 Wn. App. 400 (1985) Sept. '85 LED:13. The court then concludes its opinion as follows.]**

Based on the foregoing, we conclude that the entry in this case was lawful. The police had a search warrant of unquestioned validity. After they knocked, Alldredge opened the door. The police immediately told him, face to face, who they were and why they were there. These actions fulfilled the purposes of the knock-and-wait rule, and entitled the police to enter by virtue of the authority granted in the warrant. We conclude that the trial court did not err when it denied the motion to suppress.

[Citations, footnotes and text omitted]

IMPLIED CONSENT: LICENSE REVOCATION FOLLOWING ALCOHOL TEST REFUSAL UPHELD; DAZED ARRESTEE HAD SUFFICIENT CAPACITY TO DECIDE WHETHER TO TAKE TEST

Nettles v. DOL, 73 Wn. App. 730 (Div. III, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

On July 29, 1990, State Trooper Darren Hettinger was called to the scene of a 1-car accident near Twisp, Washington. Mr. Nettles was lying next to his Jeep and was covered with blood from his head to his waist. Trooper Hettinger testified Mr. Nettles did not appear to be in pain. In answer to the trooper's questions, Mr. Nettles said he did not know whether he was the driver of the Jeep, then he affirmatively stated he had been alone in the vehicle. Mr. Nettles started singing and laughing. Trooper Hettinger noticed a strong odor of intoxicants on his breath.

Mr. Nettles was taken to the Twisp Medical Center. Trooper Hettinger followed, and arrested him for reckless driving and driving while under the influence of alcohol. Trooper Hettinger advised Mr. Nettles of his constitutional rights. Mr. Nettles indicated he understood his rights, and he refused to waive them. The trooper read him the implied consent warnings for blood testing. Mr. Nettles refused to submit to a blood test. Trooper Hettinger testified he did not take an involuntary blood sample because Mr. Nettles did not come within the statutory provisions [RCW 46.20.308(3)] for such a test.

On cross examination, Trooper Hettinger admitted he had printed "I ain't OK" at the bottom of the implied consent form. The trooper said he did not remember why he had done so, but he thought probably Mr. Nettles had made that statement to him at some point in time. Trooper Hettinger also admitted asking the emergency room physician whether he thought Mr. Nettles was conscious. The defense did not inquire as to what the doctor's response was.

In his testimony, Mr. Nettles described his injuries, which included numerous lacerations, a cerebral concussion, collapsed lung, bruised lung, broken ribs, broken scapula, and many bruises. He stated he did not remember much about what happened after the accident, and he remembered nothing about Trooper Hettinger or the questions he asked.

RCW 46.20.308(4) provides that persons who are "dead, unconscious, or . . . otherwise in a condition rendering [them] . . . incapable of refusal . . .", are deemed not to have withdrawn their implied consent to tests measuring their blood alcohol levels. In its oral ruling reversing the Department's decision to revoke Mr. Nettles' license, the court cited Mr. Nettles' injuries and its belief emergency workers had medicated him by the time Trooper Hettinger asked him to submit to the blood test. The court concluded (1) the Department had the burden of demonstrating Mr. Nettles was capable of refusal before his consent was sought, and (2) the Department failed to carry that burden, offering no medical evidence concerning Mr. Nettles' mental capacity.

ISSUE AND RULING: Was Nettles' apparent capacity to decide whether to take an alcohol content test sufficient to require revocation of his license under implied consent law for "refusal" of the test? (ANSWER: Yes) Result: reversal of Okanogan County Superior Court order reversing DOL suspension; DOL decision revoking Nettles' license reinstated.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In Gibson v. Department of Licensing, 54 Wn. App. 188 (1989) **[Nov. '89 LED:17]**, the court construed RCW 46.20.308(4). The court held that the phrase "otherwise in a condition rendering [the driver] incapable" of refusing a blood alcohol test, is restricted to "other physical conditions" which "clearly appear to prevent a driver from responding to the officer's request." . . . Gibson. We adopted Gibson's holding in Steffen v. Department of Licensing, 61 Wn. App. 839 (1991)**[Feb. '92 LED:14]**.

The Gibson construction is practical in its application because it focuses upon the arresting officer's reasonable perceptions of the driver's capacity; he does not have to "guess" what the driver's mental capacity, in fact, is. It is also consistent with cases which hold that the implied consent law does not require that the driver make a knowing and intelligent decision to refuse the test; it only requires that the driver have the opportunity to exercise an informed judgment.

Based upon the above authority, we hold that the trial court erred when it concluded the Department failed to satisfy its burden of proof. The Department presented evidence that Mr. Nettles, although injured, was talking and responded to Trooper Hettinger's questions. Trooper Hettinger fully advised him of his constitutional rights and his rights under the implied consent law. He refused to waive his constitutional rights, and he also refused to take a blood test. This evidence was sufficient to show Mr. Nettles had the opportunity to make an informed decision. The Department did not have the burden of proving Mr. Nettles in fact had the mental capacity to make a knowing and intelligent decision.

> The judgment of the Superior Court is reversed and the Department's decision revoking Mr. Nettles' license is reinstated.

[Some citations omitted]

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1994 WASHINGTON LEGISLATIVE ENACTMENTS -- PART III

LED EDITOR'S INTRODUCTORY NOTE: This is part 3 of what we expect to be a four-part update of Washington State legislative enactments. We believe that with this part we will have provided information about all 1994 enactments of general interest to law enforcement officers and or their agencies. Next month's part 4 will revisit previously digested legislation on which we have additional information of interest; we will also provide an index of enactments covered in parts 1 through 4.

PUBLIC TRANSIT FACILITY CRIMES

CHAPTER 45 (SSB 6505)

Effective Date: June 9, 1994

Section 1 makes clear that the Legislature does not preempt local criminal ordinances addressing public transit facility conduct. Section 2 amends RCW 7.48.140(4) to make it a crime --

> to unlawfully obstruct or impede the flow of municipal transit vehicles as defined in RCW 46.04.355 or passenger traffic, access to municipal transit vehicles or stations as defined in RCW 9.91.025(2)(a), or otherwise interfere with the provision or use of public transportation services, or obstruct or impede a municipal transit driver, operator, or supervisor in the performance of that individual's duties; . . .

Section 3 amends RCW 9.66.010 (public nuisance law) to make it a public nuisance to "unlawfully interfere with" a "municipal transit vehicle or station . . .." Section 4 amends RCW 9.91.025(1) to make it "unlawful bus conduct (among other acts) if a person, acting with knowledge the conduct is prohibited --

> (f) Intentionally obstructs or impedes the flow of municipal transit vehicles or passenger traffic, hinders or prevents access to municipal transit vehicles or stations, or otherwise unlawfully interferes with the provision or use of public transportation services;
> (g) Intentionally disturbs others by engaging in loud, raucous, unruly, harmful, or harassing behavior; or
> (h) Destroys, defaces, or otherwise damages property of a municipality as defined in RCW 36.58.272 employed in the provision or use of public transportation services.

Section 4 also amends subsection 2 of RCW 9.91.025 to read as follows:

> For the purposes of this section, "municipal transit station" means all facilities,

structures, lands, interest in lands, air rights over lands, and rights of way of all kinds that are owned,leased, held, or used by a municipality as defined in RCW 35.58.272 for the purpose of providing public transportation services, including, but not limited to, park and ride lots, transit centers and tunnels, and bus shelters.

Unlawful bus conduct is a misdemeanor.

DOC NOTIFICATION RE RELEASE OF CERTAIN OFFENDERS

CHAPTER 77 (SHB 2197)

Effective Date: June 9, 1994

Amends RCW 9.94A.155(2), which requires that in some circumstances DOC notify victims and witnesses regarding release of persons previously convicted of certain serious crimes. The amendment requires that, when DOC's mailed release notice to a victim or witness is returned as "undeliverable," DOC "shall attempt alternative methods of notification, including a telephone call to the person's last known telephone number."

The amendment also mandates that:

> (6) The department of corrections shall keep, for a minimum of two years following the release of an inmate, the following:
> (a) A document signed by an individual as proof that that person is registered in the victim or witness notification program; and
> (b) A receipt showing that an individual registered in the victim or witness notification program was mailed a notice, at the individual's last known address, upon the release or movement of an inmate.

PUBLIC SCHOOL ATTENDANCE BY JUVENILE SEX OFFENDERS

CHAPTER 78 (ESHB 2198)

Effective Date: June 9, 1994

Amends RCW 13.40.215 to add a subsection providing:

> (5) Upon discharge, parole, or other authorized leave or release, a convicted juvenile sex offender shall not attend a public elementary, middle, or high school that is attended by a victim of the sex offender. The parents or legal guardians of the convicted juvenile sex offender shall be responsible for transportation or other costs associated with or required by the sex offender's change in school that otherwise would be paid by a school district. Upon discharge, parole, or other authorized leave or release of a convicted juvenile sex offender, the secretary **[of DSHS]** shall send written notice of the discharge, parole, or other authorized leave or release and the requirements of this subsection to the common school district board of directors of the district in which the sex offender intends to reside or the district in which the sex offender last attended school, whichever is appropriate.

SEX OFFENDER REGISTRATION

CHAPTER 84 (HB 2340)

Effective Date: June 9, 1994

Amends RCW 9A.44.130(3)(a)(ii) (sex offender registration law) to clarify that, as to sex offenders who are not in custody but remain under state or local jurisdiction (e.g. on parole):

> A change in supervision status of a sex offender who was required to register under this subsection (3)(a)(ii) as of July 28, 1991, shall not relieve the offender of the duty to register or to register following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

LAW ENFORCEMENT MEDAL OF HONOR

CHAPTER 89 (HB 2419)

Effective Date: June 9, 1994

Establishes a State Law Enforcement Medal of Honor Committee to nominate candidates for award of a medal of honor to law enforcement officers who have been seriously injured or killed in the performance of duty or who have been distinguished by exceptionally meritorious conduct. The award shall be made during Law Enforcement Recognition Week.

SEX OFFENDER RELEASE NOTICES

CHAPTER 129 (SHB 2540)

Effective Date: June 9, 1994

Section 1 declares legislative intent as follows:

> The legislature finds that members of the public may be alarmed when law enforcement officers notify them that a sex offender who is about to be released from custody will live in or near their neighborhood. The legislature also finds that if the public is provided adequate notice and information, the community can develop constructive plans to prepare themselves nd their children for the offender's release. A sufficient time period allows communities to meet with law enforcement to discuss and prepare for the release, to establish block watches, to obtain information about the rights and responsibilities of the community and the offender, and to provide education and counseling to their children. Therefore, the legislature intends that when law enforcement officials decide to notify the public about a sex offender's pending release that notice be given at least fourteen days before the offender's release whenever possible.

Section 2 amends the qualified civil liability immunity provision of RCW 4.24.550 by adding a new subsection to .550 reading as follows:

> (2) Local law enforcement agencies and officials who decide to release information

pursuant to this section shall make a good faith effort to notify the public and residents at least fourteen days before the sex offender is released. If a change occurs in the release plan, this notification provision will not require an extension of the release date. The department of corrections and the department of social and health services shall provide local law enforcement officials with all relevant information on sex offenders about to be released or placed into the community in a timely manner. [Emphasis added]

Sections 4 through 9 provide similarly for notices to police by DOC or DSHS of pending releases of sex (and other) offenders under RCW 10.77(the criminally insane), RCW 13.40.215 (juveniles), RCW 43.43.745 (furloughed DOC prisoners) and RCW 71.05 (involuntary commitments).

VEHICLE FORFEITURE FOR DUI, PHYSICAL CONTROL

CHAPTER 139 (SSSB 5341)

Effective Date: June 9, 1994

LED EDITOR'S INTRODUCTORY NOTE: The following summary of procedures to be followed and forms to be used in forfeiting vehicles under chapter 139, Laws of 1994, is our best guess at how this new forfeiture law is to work. We have based our proposed Document A in part on a singular draft form which a King County Deputy Prosecutor roughed out in 1993. Please confer with your city attorney or county prosecutor before proceeding under chapter 139. At LED deadline we know of no agency currently using this new law, although we assume that some agencies are doing so. If your agency is using this law and has developed its own procedures and forms, please FAX copies to (206) 587-4290 or mail to John Wasberg, Assistant Attorney General, 900 4th Ave., Suite 2000, Seattle, WA 98164. We plan to revisit this subject in a future LED.

SECTION 1 (Notice and Process for Forfeiture)

Step 1: Arrest on probable cause or filing of charges for DUI or physical control where offense occurs within five years of a previous DUI or physical control conviction date.

Step 2: At time of arrest or thereafter, give written notice [**Document A** -- set out at end of this summary] to DUI or physical control driver that any transfer, sale, or encumbrance of the motor vehicle involved in the most recently alleged offense is unlawful unless (1) the person is acquitted, (2) charges are dismissed, (3) charges are otherwise terminated, or (4) the person is convicted and 60 days transpire following conviction.

EXCEPTIONS: There are exceptions to the prohibition in section 1 as follows:

(a) A vehicle encumbered by a bona fide security interest may be transferred to the secured party or to a person designated by the secured party;

(b) A leased or rented vehicle may be transferred to the lessor, rental agency, or to a person designated by the lessor or rental agency; or

(c) A vehicle may be transferred to a third party or a vehicle dealer who is a bona fide purchaser or may be subject to a bona fide security interest in the vehicle unless it is established that (i) in the case of a purchase by a third party or vehicle dealer, such party or dealer had actual notice that the vehicle was subject to the prohibition prior to the purchase, or (ii) in the case of a security interest, the holder of the security interest had actual notice that the vehicle was subject to the prohibition prior to the encumbrance of title.

Step 3: Upon a DUI or physical control conviction for an offense which occurs within five years of the date of a previous conviction, the court shall issue process authorizing seizure of the vehicle [**Document B**] (If the vehicle was previously seized under such an order, then it may be re-seized without an order.).

Step 4: After the law enforcement agency seizes the vehicle, that agency serves notice of the seizure and intended forfeiture [**Document C**] "within 15 days after the seizure" on (a) the vehicle owner, (b) the person in charge of the vehicle, and (c) any persons with a known right or interest, including a community property interest (See section 1(4) re: allowed methods of service.).

Step 5: Wait 45 days and, if no one claims a right to ownership or possession of the vehicle, the vehicle is forfeited.

Step 6: If notice of a claim or right to possession or ownership is timely filed within 45 days then a hearing will be scheduled either before the agency or in court under procedures which parallel those for forfeiture of personal property under the Uniform Controlled Substances Act (RCW 69.50.505).

Other provisions in section 1 address: what may be done with the vehicle following final forfeiture (subsection 7), records required to be kept (subsections 8 and 9), quarterly reports to the state treasurer required (subsections 10 and 11), dollar remissions to state treasurer required (subsections 12, 13, and 14).

SECTION 2 (Crime and Punishment)

RCW 46.12.270 is amended to add language which makes it a misdemeanor ($\leq$ \$250, $\leq$ 90 days) to transfer, sell or encumber an interest in a vehicle in violation of section 1 with actual notice of the statutory prohibition.

DOCUMENT A (Notice of Prohibition on Transfer]

Arresting officer or prosecutor or court (in preliminary hearing) would use a form along the following lines (While we haven't done so, it wouldn't hurt to expressly reference the statutue and attach a copy of the 1994 act):

NOTICE OF PROHIBITION ON TRANSFER

It is unlawful to transfer, sell or encumber the ownership of a motor vehicle that was driven by or was under the actual physical control of the owner of the vehicle who has previously been convicted of a violation of RCW 46.61.502 or 46.61.504 within a five-year period and is currently

charged with a violation of RCW 46.61.502 or 46.61.504, except that:

1. A vehicle encumbered by a bona fide security interest may be transferred to the secured party or to a person designated by the secured party; and

2. A leased vehicle may be transferred to the lessor or to a person designated by the lessor.

Any person violating RCW 46.12.250, 46.12.260, or Section 2 of Chapter 139, Session Laws, 1994, is guilty of a misdemeanor and shall be punished by a fine of not more than $250.00 or by imprisonment in a county jail for not more than ninety (90) days.

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENTS

_____ _____
Suspect signature Date

_____ _____
Place/Location Time

To be filed out in advance by law enforcement officer or other designated official:

Vehicle License No. _____ State: _____

VIN/Hull No.: _____ Year: _____

Make: _____ Model: _____

Style: _____Color: _____

Special
Features/Description:_____

Registered Owner's Name:
_____

Registered Owner's Address:
_____

<u>DOCUMENT B</u> [Court Process for Seizure]

We have not developed a draft form for this. We believe it could be a fill-in-the-blank "warrant for seizure of motor vehicle under chapter 139, session laws of 1994."

<u>DOCUMENT C</u> [Seizure Notice]

The notice of seizure provisions of chapter 139 parallel those in the UCSA, RCW 69.50.505, and, accordingly, the notice to the vehicle owner should be along the lines of the notice of seizure and intended forfeiture used under RCW 69.50. We are therefore setting out only the first paragraph of a proposed notice form.

NOTICE OF SEIZURE AND INTENDED FORFEITURE

> A vehicle driven by or under the actual physical control of the owner of the vehicle in violation of RCW 46.61.502 or 46.61.504 is, upon the conviction of the owner when that conviction is the second or subsequent conviction for a violation of RCW 46.61.502 or 46.61.504 within a five-year period, subject to seizure and forfeiture and no property right exists in that vehicle.

[After paragraph 1, the "Notice" is basically the same as the notice used under RCW 69.50.505.]

JUNK VEHICLES

CHAPTER 176 (SHB 2629)

Effective Date: June 9, 1994

Amends RCW 46.55.010(4) to modify slightly the definition of "junk vehicle." Also amends RCW 46.55.240(2) to add the following sentence relating to local junk vehicle ordinances:

> A city, town, or county may also provide for the payment to the tow truck operator or wrecker as a part of a neighborhood revitalization program.

Also amends RCW 46.63.030(4) to add a sentence reading as follows:

> (4) In the case of failure to redeem an abandoned vehicle under RCW 46.55.120 an officer shall send a notice of infraction by certified mail to the last known address of the registered owner of the vehicle.

UNDERAGE PERSONS IN LICENSED PREMISES

CHAPTER 201 (SSB 6298)

Effective Date: June 9, 1994

Cleanup legislation amends various provisions of Title 66 RCW (Liquor Act) relating to licensing and enforcement of the laws governing licensed premises. Among the changes to Title 66 RCW are minor changes to the following sections relating to the presence of persons under twenty-one years of age on licensed premises: RCW 66.20.200, RCW 66.44.300, and RCW 66.44.310.

CIGARETTE MACHINE LOCATIONS

CHAPTER 202 (ESB 6356)

Effective Date: June 9, 1994

Amends RCW 70.155.030 to allow an exception to the "10 feet" limit for cigarette machine locations (the limit applies to bars and to industrial worksites where no minors are employed) in circumstances covered by Liquor Board administrative regulation which will allow an exemption where such a limit is "architecturally impractical."

INVOLUNTARY ALCOHOLISM TREATMENT

CHAPTER 231 (HB 2511)

Effective Date: April 1, 1994

Amends RCW 70.96A.020(13)'s definition of "incapacitated by alcohol or other psychoactive chemicals" by striking the words, "constitutes a danger," and inserting the words, "presents a likelihood of serious harm" and adds a new subsection (17) to 70.96A.020 defining "likelihood of serious harm" as follows:

> (17) "Likelihood of serious harm" means either: (a) A substantial risk that physical harm will be inflicted by an individual upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self; (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior that has caused the harm or that places another person or persons in reasonable fear of sustaining the harm; or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others.

LED Editor's Note: The definition of "likelihood of serious harm" in chapter 70.96A RCW (the chapter on alcoholism and drug treatment) is now the same as in chapter 71.05 RCW (the chapter on mental illness). The same definition now will guide police when they are trying to decide if a person: (a) may be taken into protective custody under the alcoholism and drug treatment chapter based on incapacitation by alcohol or drugs or (b) may be taken into custody under the mental illness chapter. See RCW 71.05.150; see also State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93 LED:15. Note: Another circumstance which justifies taking a person into protective custody under RCW 70.96A.120 is where the person is "gravely disabled by alcohol or other drugs" as defined at RCW 70.96A.020(12). The latter definition in 70.96A was not amended in 1994, nor was the parallel definition of "gravely disabled" in the mental illness statute at RCW 71.05.020(1).

COMBINED FISHING AND HUNTING LICENSE

CHAPTER 255 (ESSB 6125)

Effective Date: January 1, 1995

Section 1 amends chapter 77.32 RCW by adding a new section creating a "sport recreational license" which "shall include the personal use food fish, game fish, hunting, hound, and eastern

Washington upland bird licenses, for residents and nonresidents." Section 1 continues: "The license shall also include three-day game fish and food fish licenses, for residents and nonresidents. The license shall include a warm water game fish surcharge, the funds from which shall be deposited in the warm water game fish account created under section 18 of this act."

Other sections amend RCW 75.25.091 (personal use food fish license); RCW 75.25.092 (personal use shellfish and seaweed license); RCW 75.25.150 (harvesting or possessing shellfish, food fish or seaweed without a license). Various other sections in Title 75 and Title 77 RCW are also amended.

SEAWEED HARVESTING

CHAPTER 286 (SSB 6204)

Effective Date: July 1, 1994

Section 1 amends RCW 79.01.805 (which presently limits harvest-for-personal-use-of- seaweed) by adding subsections (2), (3) and (4) prohibiting commercial harvesting of seaweed except under certain circumstances.

Section 2 amends RCW 79.01.810 by striking all existing language and inserting in its place new provisions designating criminal penalties and civil damages provisions for illegal harvesting and possession of seaweed.

Section 3 declares that fish and wildlife officers, as well as certain other law enforcement authorities, may enforce seaweed harvesting and possession restrictions. Section 4 repeals RCW 79.01.820, and section 5 decodifies RCW 79.96.907.

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FOLLOWUP NOTES ON ENACTMENTS DIGESTED IN EARLIER LED'S

Chapter 190 [ALIENS CARRYING FIREARMS] -- June LED at 09 -- BEWARE: state and local law enforcement officers are not INS agents and have no authority to request information about a person's citizenship status except in the course of attempting to identify the person for other, legitimate law enforcement reasons . . .

Chapter 196 [OBSTRUCTING A LAW ENFORCEMENT OFFICER] -- June LED at 09 -- In our view the 1994 amendment to RCW 9A.76.020 expanded the reach of the obstructing statute and did not in any way narrow the reach of the existing prohibition on "hindering, delaying or obstructing." Hence, we believe that if a person lies to an officer in a non-detention situation (the 1994 amendment applies to lawful detentions, i.e., Terry stop or arrest situations, only), "obstructing" may be charged if the falsehood significantly hindered, delayed or obstructed the office's reasonable actions in following up on the false information provided . . .

Chapter 275 [OMNIBUS DRUNK DRIVING ACT] -- June LED at 14-16 -- This enactment's administrative license revocation provisions were covered in depth in training put on by Administrative Law Judge, Steve Lang, in June in various locations throughout the state. Officers who did not attend the training should be able to find others in their geographical area who did . . .

CHAPTER 7, 1ST SP. SESS. [FIREARMS ACT OVERHAUL] -- JUNE '94 LED at 16-22; JULY '94 LED at 14-21 -- An informal four-page letter of June 6, 1994 from Assistant Attorney General, James T. Schmid, to Representative Tom Campbell, offers Mr. Schmid's personal view that the new firearms law applies retroactively in the sense that new disqualifier crimes make it illegal, as of July 1, 1994, for a person to possess a firearm, even if that person was issued a "concealed weapons permit" (now referred to as a "concealed pistol license") under the old law. Our views on retroactivity expressed in the June and July LED's agree with those of Mr. Schmid. We will send copies of his letter on request. . .. Tom McBride, Executive Secretary of the Washington Association of Prosecuting Attorneys, interprets the "harassment" possession/license disqualifier much more narrowly than we did in the past two LED's. Instead of using the entire laundry list of crimes in RCW 9A.46.060 as disqualifiers, as we suggested, he would limit application to: (A) actual "harassment" convictions under RCW 9A.46.020 and (B) repeat violations against a previous harassment victim where the repeat violations are crimes on the laundry list. . . . We have also been informed by Gary Tabor, Deputy Prosecutor from Thurston County, that contrary to the view we expressed in the July LED at 19, he believes that adjudications for juvenile offenses which are equivalent to adult conviction disqualifiers do continue to be disqualifiers for firearms possession and licensing . . . Both Mr. McBride and Mr. Tabor have solid arguments for their views. Check with your prosecutor or city attorney . . .

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STATE PATROL BREATH-TEST NOTE: As of July 1, 1994, the State Patrol breath-testing section has included the following two "crime arrest for" codes in the DWI database. Operators are now instructed to enter these codes when applicable.

Minor having 0.02 or more 22
Commercial driver having .04 or more 24

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MIRANDA CARD CHANGE RE: JUVENILES

Recent changes in the juvenile offender laws mandate that certain serious offenders of age 16 or 17 will be automatically tried as adults, rather than being "declined" into adult court. Accordingly, the juvenile warning on the Miranda cards of the Criminal Justice Trianing Commission is being revised as follows:

> If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if ~~the juvenile court decides that~~ you are to be tried as an adult.

[Lineouts indicate deleted language.]

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NEXT MONTH

The September LED will include entries regarding:

(1) State v. Cole, 73 Wn. App. 844 (Div. III, 1994), a case where the Court of Appeals ruled against an officer's decision to order a vehicle passenger who was suspected of a seat belt violation and who claimed to have no identification documents (but who had not done anything to indicate that he might be dangerous): (a) to step out of the vehicle, and (b) to submit to a frisk. We will explain why we believe the Court of Appeals may have been correct on the frisk issue, but why we also believe the Court was clearly wrong under the precedents of Pennsylvania v. Mimms, 434 U.S. 106 (1977), and State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01 in asserting the officer needed to articulate objective justification for directing the seat belt violator out of the car. We believe that law enforcement officers do not need objective justification before directing any suspected criminal or traffic law violator -- driver or passenger -- to step out of a vehicle; and

(2) State v. Cantrell, Supreme Court No. 60719-2, where the State Supreme Court, on June 30, 1994, overturned a portion of the Court of Appeals ruling in the same case (see State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993)[Oct. '93 LED:21]. A unanimous State Supreme Court declares in Cantrell that the "consent search" rule of State v. Leach, 113 Wn.2d 735 (1989)[Feb. '90 LED:03], which requires affirmative consent of all persons present with common authority over private business or residential premises, does not apply to motor vehicles. Any individual in a motor vehicle may consent for all in the vehicle: (a) if the individual would have authority to consent to that search, if alone, and (b) no one else in the vehicle with common authority over the vehicle objects to the search.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.